

A **PERBADANAN PENGURUSAN GENTING PERMAI PARK
& RESORT v. APHEM SDN BHD**

HIGH COURT MALAYA, KUALA LUMPUR
S NANTHA BALAN JC
[CIVIL SUIT NO: 22NCVC-188-04-2014]

B 29 MAY 2015

C **CIVIL PROCEDURE:** *Striking out – Application for – Whether present action predicated on previous suit – Whether plaintiff in present action stepped into shoes of plaintiff in previous suit – Whether identified with interests and rights of plaintiff in previous suit – Doctrine of res judicata – Whether applicable – Whether action an abuse of court process – Rules of Court 2012, O. 18 r. 19(1)(b) & (d)*

D The defendant, pursuant to O. 18 r. 19(1)(b) or (d) of the Rules of Court 2012, sought to strike out the plaintiff's action as being vexatious, frivolous and an abuse of the process of the court by reason of the doctrine of *res judicata*. The defendant's plea of *res judicata* was predicated on the fact that a previous suit had been filed ('the Temerloh suit') and a consent order had been recorded. The plaintiff, although not named as party in the Temerloh suit, was expressly named in the consent order as the beneficiary of the sum of RM115,000 payable by the defendant. The defendant was the developer of an apartment project and was managing the project until it was handed over to the plaintiff, a management corporation established under the Strata Titles Act 1985. The defendant contended that the plaintiff in the Temerloh suit, purchasers of the apartment units ('the association') and the plaintiff in the present action was one and the same as the claims in both were of the same genre and the plaintiff was the 'beneficiary' or 'party' or 'privy' to the consent order. It was contended that since the sum had been paid to the plaintiff, the doctrine of *res judicata* was applicable and the plaintiff was precluded from filing the action against the defendant.

F **Held (allowing defendant's application in encl. 42):**

- G (1) The plaintiff was already in existence as a legal entity before the consent order was recorded. Significantly, the project had already been handed over by the defendant to the plaintiff before the consent order was recorded. Thus, the plaintiff was legally capable of suing and being sued. In this regard, the plaintiff was an integral part of the consent order, *albeit* that they were not a party to the Temerloh suit. (paras 19, 20 & 21)
- H (2) The ultimate beneficiary of a major portion of the proceeds that was payable by the defendant under the consent order was not the association. Instead, it was the plaintiff who had clearly and unequivocally accepted the payment by the defendant pursuant to the consent order. Having willingly participated in the Temerloh suit in a
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- somewhat derivative or indirect way and became the named beneficiary of a major portion of the proceeds payable under the consent order, it was not tenable for the plaintiff to take the position that they were not a party to the Temerloh suit. (paras 25 & 26) A
- (3) The plaintiff had ample time and with reasonable diligence, could have discovered and apprised themselves of all necessary and relevant complaints or grievances which they might have against the defendant and ought to have intervened in or taken over the conduct of the Temerloh suit and made their claim in those proceedings accordingly. Instead, the plaintiff was prepared to go along with the consent order and to somewhat 'step into the shoes' of the association and receive a sum of RM115,000 payable by the defendant as the settlement sum under the consent order. (paras 27 & 28) B C
- (4) As the plaintiff had derived the benefits that had accrued to the association under the consent order, the plaintiff was identified with the interests and rights of the association. Therefore, the plaintiff had indirectly become the protagonist of the Temerloh suit. In this light, the principle of *res judicata* applied to preclude the plaintiff from filing the present action which they could have done through the Temerloh suit. (paras 29 & 30) D
- (5) It was expressly stated in the consent order that there should be no fresh action by the association against the defendant. As there had been a real and substantial identification of interest between the plaintiff and the association in the Temerloh suit and particularly the consent order, the plaintiff was barred from filing any fresh action against the defendant. In the circumstances, the filing and prosecution of the action by the plaintiff was an abuse of court process warranting striking out and dismissal. (paras 31, 32 & 33) E F
- Case(s) referred to:**
- Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 SC (*refd*)
Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC (*refd*) G
- Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 2 CLJ 321 CA (*refd*)
Tanalachimy Thoraisamy & Ors v. Jayapalasingam Kandiah Yong Yoon Shing & Anor [2014] 1 LNS 340 CA (*refd*)
- Legislation referred to:** H
- Rules of Court 2012, O. 18 r. 19(1)(b), (d)
- For the plaintiff* - Gan Chong Chieh; M/s Mah Weng Kwai & Assocs
For the defendant - Cedric Miranda; M/s Cedric Miranda & Co
- Reported by S Barathi* I

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JUDGMENT

S Nantha Balan JC:

Introduction

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[1] These are my grounds in respect of an application by the defendant under O. 18 r. 19(1) (b) or r. 19(1)(d) of the Rules of Court 2012 for an order that the statement of claim be struck out as being vexatious, frivolous and an abuse of process by reason of the doctrine of *res judicata*. The defendant's plea of *res judicata* is predicated on the fact that a previous suit had been filed by way of Temerloh High Court Suit No: 22-51-2004 and a consent order

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had been recorded in that suit wherein the plaintiff, although not named as a party to the suit, were expressly named in the consent order as the beneficiary of a sum of RM115,000 that was payable by the defendant. As such, it was contended that since the sum of RM115,000 had been paid to the plaintiff, the doctrine of *res judicata* was applicable and the plaintiff was

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precluded from filing the instant action.

Background

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[2] The defendant is the developer of an apartment project known as Genting Permai Park & Resort, located in Genting Highlands, Pahang ("the Project"). The defendant managed the project until it was handed over to the plaintiff. The plaintiff is the Management Corporation for the project and was established under the Strata Titles Act 1985. The Certificate of Establishment for the plaintiff is dated 22 August 2008 ("the certificate") (See exh. H6-encl. 42).

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[3] However, the certificate declares that the plaintiff came into existence by operation of law on 2 November 2004. The relevant parts of the certificate read as follows:

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Dengan ini adalah diperakui bahawa Perbadanan Pengurusan Genting Permai Park & Resort yang beralamat di 10km, Genting Highlands, 69000 Pahang adalah sebuah badan korporat atau body corporate yang wujud secara automatik di bawah Seksyen 39 Akta Hakmilik Strata 1985 (Akta 318) pada 2hb November 2004 iaitu berikutan terdaftarnya hakmilik-hakmilik strata (strata titles) pada tarikh tersebut menurut peruntukan Bahagian III Akta ini.

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Perbadanan ini boleh mendakwa dan didakwa (may sue and be sued), mempunyai meterai (common seal), dan hak turun temurun (perpetual succession). Kewujudan Perbadanan ini TIDAK PERLU didaftarkan dengan Pendaftar Pertubuhan, Pendaftar Syarikat atau di bawah kuatkuasa mana-mana undang-undang bertulis yang lain; DAN,

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Diperakui dan disahkan oleh saya pada 22 Ogos 2008
Rujukan Perbadanan Pengurusan Bil. 05/2008
PTG.PHG.STR. 1/22/1(18)

Temerloh Suit

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[4] Prior to the present action, an earlier action relating to the project was filed in the Temerloh High Court by way of Suit No. 22-51-2004 (“the Temerloh suit”). The plaintiff in the Temerloh suit was Kulavarasalingam a/ 1 Chelliah (suing on behalf of himself/and all other member of Genting Permai Apartment Owners Association) (“the Association”). For all intents and purposes, the plaintiff in the Temerloh suit was the association. The association is also referred to by its abbreviated name, “GPAOA”.

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[5] The members of the association were all purchasers of apartment units in the project and had filed the action against the defendant based on various complaints pertaining to the defendant’s breach of its obligations under the respective sale and purchase agreements between the defendant (as vendor) and the members of the association (as purchasers).

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The Reliefs Sought In The Temerloh Suit

[6] The reliefs sought against the defendant in the Temerloh suit are as follows:

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- a. specific performance of the items as specified in paragraph 6(a) and 6(b) of the Statement of Claim;
- b. further or alternatively damages for breach of the express and/or implied terms of the Sale and Purchase Agreements entered between the members of GPAOA and the Defendant;
- c. an order that the Defendant do remove the structure as specified in paragraph 6(c) of the Statement of Claim;
- d. an order that the Defendant do dismantle the sewerage connection between the shops and offices with the sewerage treatment plant at the Resort as specified in paragraph 9 of the Statement of Claim;
- e. an order that the Defendant discontinue the commercial activities as specified in paragraph 11 of the Statement of Claim;
- f. an order for an account for profits from the commercial activities undertaken by the Defendant as specified in paragraph 11 of the Statement of Claim from May 2001 until the date of Judgment;
- g. an order for an account for sewerage charges imposed and collected by the Defendant as specified in paragraph 9 of the Statement of Claim from 1999 until the date of Judgment;
- h. an order for payment by the Defendant to all the owners of the Resort of any sum found due from the Defendant to all the owners of the Resort upon taking such account together with interest thereon;
- i. all further proper accounts, inquiries and directions;
- j. general damages;

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- A k. interest at the rate of 8% on general damages awarded calculated from the date of judgment until the date of realisation;
- l. costs; and
- m. further and other relief which this Honourable Court deems fit and proper.

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The Consent Order

[7] Apparently, after negotiations/mediation had been conducted, a consent order was recorded in the Temerloh suit on 15 March 2010 (“the consent order”). The terms of the consent order were as follows:

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- 1) Defendant to pay RM145,000/- as *ex-gratia* to the Genting Permai Apartment Owners Association Kuala Lumpur (as the Plaintiff) without admission to liability;

- 2) The payment of the amount RM145,000/- would be in 2 instalments that is:

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- (i) RM30,000/- to be paid in the name of Genting Permai Apartment Owners Association Kuala Lumpur on or before 31.3.2010; and

- (ii) *Balance of RM115,000/- to be paid in the name of Genting Permai Apartment Owners Association Kuala Lumpur on or before 30.04.2010;*

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- 3) *With regards to the terms 2(ii), Genting Permai Apartment Owners Association Kuala Lumpur promised to pay the amount of RM115,000/- to the Management Corporation, Genting Permai Park & Resort, within 7 working days after the full payment of RM115,000/- was received by Genting Permai Apartment Owners Association Kuala Lumpur;*

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- 4) No order as to cost;
- 5) *Plaintiff did not have the liberty to file afresh this Suit against the Defendant;*
- 6) The Plaintiff will not extract the Consent Judgment unless the Defendant failed to fulfil terms 1 and/ or 2 of this Consent Judgment; and

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- 7) Terms in this Consent Judgment is confidential between parties to this Suit and both parties cannot divulge the contents of this Consent Judgment to a third party through an agent, staff or members of the parties in this Suit.

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(emphasis added)

[8] It is clear from the consent order that parties had agreed that no further action would be filed by the association against the defendant. Further, and quite significantly, it is expressly stated in the consent order that the sum of RM115,000 which is to be paid by the defendant to the association would be paid over to the present plaintiff.

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[9] In this regard, it is not in dispute that the sum of RM115,000 was indeed paid by the defendant to the association and the latter had duly paid the sum over to the plaintiff. This is in fact clearly reflected in the plaintiff's financial records. (See plaintiff's Income & Expenditure Statement for Financial Year Ended 31 May 2013 (exh. H24 encl. 42) where it is stated that RM115,000 was received as a settlement sum from the developer).

[10] Further, in the notes to the financial statement for the same financial period, it is stated in item (9) under the caption "Settlement Sum From the Developer" that:

This represents the **settlement sum awarded by the Court to the Perbadanan Pengurusan Genting Permai Park & Resort** in the form of an *ex-gratia* payment in respect of the law suit by Genting Permai Apartment Owners Association against the developer of Genting Permai Park & Resort. (emphasis added)

Handover Of The Project

[11] To continue with the narrative, on 17 September 2008, the plaintiff issued a letter to the defendant (exh. H 35 – encl. 45) confirming that they, as the management corporation for the project, had appointed Global Property Services Sdn Bhd as property agent and that they will take over and manage the resort. The defendant was asked to send a representative to be present at the Club House on 22 September 2008 at 10am for the official handover.

[12] Thereafter, nothing untoward occurred between the plaintiff and defendant and meanwhile, the consent order was recorded in the Temerloh suit on 15 March 2010.

Plaintiff's Claim

[13] What happened next is that by letter dated 9 January 2013 (exh. H25 - encl. 42), the plaintiff issued a letter of demand through the solicitors demanding a sum of RM886,938.76. The letter reads as follows:

2. We were instructed by our client to demand from you as the developer of the Genting Permai Park & Resort the sum of RM886,938.76 being the sinking fund, maintenance costs for the sewerage for the sewerage treatment plant and fire protection services expenses.
3. We are informed by our client that the sinking fund collected by you from the owners was not handed over to the Management Corporation after its formation.
4. Further, we were also informed by our client that the Management Corporation has had to incur the costs of maintaining the Sewerage Treatment Plant and expenses for fire protection services of Genting Permai Park & Resort which ought to have been borne by you.

A The particulars of the demand are as follows:

	No. Particulars	Amount (RM)
	1. Sinking Fund (1999 – May 2008)	685,370.48
B	2. Maintenance costs for the Sewerage Treatment Plant (2008 – 2012)	187,208.28
	3. Fire Protection Services Expenses (2009)	<u>14,360.00</u>
C	Total	886,938.76

The Present Suit

D [14] The present suit was then filed on 21 April 2014. The defendant maintains that the plaintiff in the present action and the plaintiff in the Temerloh suit is one and the same and that the association has “evolved” into the plaintiff and that although the present suit and the Temerloh suit are not exactly identical, the claims in both are of the same genre and that as the plaintiff was a “beneficiary” or “party” or “privy” to the consent order, the plaintiff was accordingly barred from instituting the present action by reason of the principle of *res judicata*.

E [15] In a nutshell, that is the case for the defendant. However, the plaintiff states that they and the association are different entities and that the plaintiff was not a party to the Temerloh suit. It was emphasised that in the Temerloh suit, the association was seeking to enforce the contractual rights of its members under their respective sale and purchase agreements whereas in the present suit, the plaintiff, as the management corporation was seeking remedies due to the defendant’s failure to comply with its duties under the law prior to handing over of the management of the project to the plaintiff.

G [16] Counsel for the plaintiff alluded to the fact that there are several triable issues with respect to the plaintiff’s present complaints against the defendant and as such, following the principles enunciated in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7, the action should not be struck out.

H [17] In this regard, counsel submitted that so long as there is an issue or question which is fit for determination for trial, the action should not be struck out, no matter how weak the plaintiff’s case was.

I [18] In so far as the defendant’s plea of *res judicata* is concerned, the plaintiff’s response was also that they are not a party to the Temerloh suit nor are they privies. (See: *Tanalachimy Thoraisamy & Ors v. Jayapalasingam Kandiah Yong Yoon Shing & Anor* [2014] 1 LNS 340; [2014] 4 MLJ p. 85).

Conclusion

[19] In this case, going by the events that have occurred prior to the consent order in the Temerloh suit, it is clear that the plaintiff was already in existence as a legal entity before the consent order was recorded. Significantly, the project had already been handed over by the defendant to the plaintiff in September 2008 which was also well before the consent order was recorded. Further, the plaintiff could not have been unaware of the Temerloh suit and/or the consent order. Indeed, there is no such assertion by the plaintiff. But, I do note that there is a paucity of evidence as to the circumstances which lead to the plaintiff's name being mentioned in the consent order and the association giving up their rights and entitlements in respect of the sum of RM115,000. I will come back to this topic a little later on in this judgment.

[20] At any rate, before the date of the consent order, there is no doubt that the plaintiff was legally capable of suing and being sued. The next important question in the context of the issue of *res judicata* is whether the plaintiff was a party or a privy to the Temerloh suit or the consent order.

[21] In this regard, it is clear as night follows day that the plaintiff was an integral part of the consent order, *albeit* that they were not strictly speaking, a party to the Temerloh suit. The express wordings in the consent order and the undisputed documentary evidence shows that the plaintiff was the ultimate beneficiary of the sum of RM115,000 that was payable by the defendant as the second tranche under the consent order.

[22] It is trite that *res judicata* operates in a situation where there is an identity of parties and extends to persons who are "privies" or have a "privity of interest" as well. (See: *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189). Thus, the imperative question here is whether the plaintiff is a privy or has privity of interest *vis-a-vis* the Temerloh suit or the consent order.

[23] The phrase 'privies' or 'privity of interest' was lucidly explained by the learned judge, Mohamed Ariff JCA (as he then was) in *Tanalachimy Thoraisamy & Ors v. Jayapalasingam Kandiah Yong Yoon Shing & Anor* [2014] 4 MLJ p. 85 at p. 102, where he said:

[43] On the issue of whether the present plaintiffs are 'privies' or have a 'privity in interest' with the plaintiffs in the origination summons action, the cases have not adopted a very wide concept for these terms. Counsel for the first respondent has referred us to the meaning of 'privies' as expounded in *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90, which in turn adopts the analysis of Lord Reid in *Carl-Zeiss Stiftung v. Rayner*

- A *and Keeler Ltd and others (No 2)* [1966] 2 All ER 536. To enumerate a few categories mentioned in *Carl-Zeiss Stiftung*'s case they include the following:
- (a) any person who succeeds to the rights or liabilities of a party after his death;
- B (b) personal representatives;
- (c) assignees;
- (d) liquidators; and
- (e) successors in title to land.
- C [44] From the above enumeration, it can be seen that there has to be more than 'proof of curiosity or concern in the litigation' or just 'some interest in the outcome' (*Gleeson v. J Wippell & Co* [1977] 1 WLR 510. There has to be 'a sufficient degree of identification between the two parties (per Megarry VC in *Gleeson*).
- D [45] The question to be asked in the context of this appeal is whether there exists that 'sufficient degree of identification' between the plaintiffs in the originating summons action and the present plaintiffs in the writ action to make it just and reasonable that the present plaintiffs should be held bound by the outcome of the originating summons action?
- E [24] Hence, turning to the present factual matrix, it is relevant to ask whether the plaintiff was a party or a privy or had privity of interest *vis-a-vis* the consent order in the sense that they were successors in title to the rights that accrued there under.
- F [25] From the materials presented to this court, the answer is patently clear. The ultimate beneficiary of a major portion of the proceeds (RM115,000) that was payable by the defendant under the consent order was not the association (which was the protagonist of the Temerloh suit) but was instead the plaintiff who received a major portion of the proceeds of the settlement sum that was payable under the consent order and which was paid
- G by the defendant and ultimately channelled by the association into the account of the plaintiff and which had been clearly and unequivocally accepted by the plaintiff as a payment by the defendant to the present plaintiff pursuant to the consent order.
- H [26] Against these background facts, the essential question is whether the plaintiff can now assert that they are not a party to the Temerloh suit or the consent order. In my view, given the background circumstances, as stated above, it is not tenable for the plaintiff to take such a position as they had willingly participated in the Temerloh suit in a somewhat derivative or
- I indirect way and became the named beneficiary of a major portion of the proceeds payable under the consent order. They are therefore privy to or have privity of interest under or in relation to the consent order.

[27] Before I conclude, I should state that the plaintiff had ample time and with reasonable diligence, could have discovered and apprised themselves of all necessary and relevant complaints or grievances which they may have against the defendant and ought to have intervened in or taken over conduct of the Temerloh suit and made their claim in those proceedings accordingly.

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[28] Instead, the plaintiff was prepared to go along with the consent order and to somewhat “step into the shoes” of the association and receive a sum of RM115,000 payable by the defendant as the settlement sum under the consent order.

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[29] As stated earlier, the defendant maintains that the association has ‘evolved’ into the plaintiff. I do not agree. They are separate and different entities. But, it is fair to say that the plaintiff had derived the benefits that had accrued to the association under the consent order and are therefore identified with the interests and rights of the association.

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[30] The significance of the plaintiff receiving the monetary benefit (RM115,000) under the consent order is that they have taken over the rights of the association and indirectly become the protagonist of the Temerloh suit. In this regard, the reliefs prayed for in the Temerloh suit, with the exception of prayer (h) are all reliefs for the common benefit of all the apartment owners in the project. As such, it is not wrong to conclude that the association was in fact substantially pursuing a claim for the benefit of the project, which is the very thing that should have been done by the plaintiff after they came into existence. As such, it is no surprise that the association gave up RM115,000 for the benefit of the plaintiff. On that analysis, I am inclined to agree that the principle of *res judicata* applies to preclude the plaintiff from filing the present action which they could have done through the Temerloh suit.

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[31] In this regard, I am mindful that there may be circumstances where it could be unjust to apply the doctrine of *res judicata* (See: *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 2 CLJ 321; [2001] 4 MLJ 346). However, I am not persuaded that in the present circumstance, it would be unjust to apply the doctrine of *res judicata*. I am satisfied that there has been a real and substantial identification of interest between the plaintiff and the association in the Temerloh suit and particularly the consent order.

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[32] Further, it was expressly stated in the consent order that there should be no fresh action by the association against the defendant. As the plaintiff has been identified with the association in the manner described above, I am of the view that the plaintiff is likewise barred from filing any fresh action against the defendant.

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[33] Whilst there may be triable issues of and concerning the defendant’s duties and obligations in law, prior to handing over of the project to the plaintiff, the circumstances of the case, as discussed above, would render the

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A filing and prosecution of this action by the plaintiff an abuse of process and it is appropriate that the summary jurisdiction under O. 18 r. 19(1)(b) and (d) Rules of Court 2012 be employed and for the action to be struck out and dismissed accordingly.

B [34] In the circumstances, for the reasons alluded to earlier, I allowed the defendant's application in encl. 42. I also ordered that the plaintiff are to pay costs of RM10,000 to the defendant.

Order accordingly.

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